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IN THE

Supreme Court of the United States

October Term, 1962.

No. 874

BOARD OF PUBLIC EDUCATION, SCHOOL DISTRICT OF PHILADELPHIA

v.

BERNARD AUGUST, *Petitioner.*

PETITION FOR WRIT OF CERTIORARI AND APPENDIX.

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No.

IN RE: BOARD OF PUBLIC EDUCATION

v.

BERNARD AUGUST

PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The Opinion of the Supreme Court of Pennsylvania is reported at 406 Pa. 229 (11-40). The Opinion of the Court of Common Pleas of Philadelphia County is unreported (137a).

JURISDICTIONAL STATEMENT.

On January 17, 1962, the Supreme Court of Pennsylvania, in a final order, reversed an order of the Court of Common Pleas of Philadelphia County and thus reinstated the Board of Public Education's dismissal of petitioner on the charge of incompetency for refusal to answer a question asked by the Superintendent of Philadelphia public schools.

The Board of Public Education's dismissal had been affirmed by the Superintendent of Public Instruction of Pennsylvania.

Jurisdiction to review the above Order is invoked under the Act of June 25, 1948 c. 646, 62 Stat. 929 (28 USCA 1257).

QUESTIONS PRESENTED.

1. When there was no evidence that petitioner refused to answer a question, was it a denial of due process to dismiss him for refusal to answer a question?

2. When petitioner had been granted permission to obtain advice of counsel but was given no warning that his refusal to answer might be grounds for his dismissal, was it a denial of due process to dismiss him for refusal to answer?

3. When petitioner subsequently answered all relevant questions asked by the Board of Public Education, was it a denial of due process to dismiss him for refusal to answer the same area of questioning by the Superintendent of Schools?

CONSTITUTIONAL PROVISIONS INVOLVED.

Amendment XIV to the Constitution of the United States, Section 1, provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person in its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE.

Petitioner, a long time teacher of mathematics in the Philadelphia public school system, was dismissed on April 12th, 1954 for incompetency on the ground that he had refused to answer his Superintendent's questions about his loyalty.

At the Board of Education's hearing only two witnesses testified: the Philadelphia Superintendent of Public Schools, Dr. Hoyer, and petitioner.

Dr. Hoyer testified:

"A. Mr. August appeared in my office in October (14, 1952) of that year, in response to a . . . request on my part. (13a)

* * *

A. I indicated to him that I had information in my possession concerning which I should like to have his reaction, I wanted to ask him certain questions, and that those questions had relation to his loyalty. (13a)

* * *

Q. What did you ask Mr. August when he came to your office on October 14th (1952) . . .

A. I did not ask him anything.

Q. Did he refuse to answer anything if you did not ask him anything?

A. That would hardly be possible. (35a)

* * * *

A. I told him on his request that I was agreeable to his consulting counsel.

Q. And did he leave your office on October 14th to consult counsel?

A. That was the purpose as I understood it. (40a)

* * *

A. There was no further conference with Mr. August. He telephoned to my office on October 22

(1952), indicating that he had the advice of counsel, and the advice was the same as it had been in other cases, and that he would not answer the questions. (15a)

* * *

Q. Did you ever ask him for a second interview?

A. No, I did not.

Q. Did he ever refuse to go to a second interview?

A. No, I did not ask him to come to a second interview. (40a)

* * *

Q. Did you ever direct Mr. August to answer a question which he refused to answer?

A. I did not ask Mr. August any question." (41a)

* * *

At the same hearing petitioner testified fully about his past and present political associations which related to his loyalty (62a-67a). Thereafter, he was thoroughly cross-examined both by the Board counsel and by individual members of the Board. Petitioner answered all questions relevant to his loyalty (68a-108a).

On April 12, 1954 the Board of Education sustained the charge and approved petitioner's dismissal (113a). On January 17, 1955 the Superintendent of the Pennsylvania Department of Public Instruction dismissed petitioner's appeal and affirmed his dismissal (118a).

Petitioner promptly appealed to the Court of Common Pleas of Philadelphia, filing exceptions to the adjudication of the Superintendent of Public Instruction (41-44).

Petitioner's appeal was held in abeyance, with others, pending the disposition of other previously appealed cases growing out of the same series of incidents. *Board of Public Education v. Beilan*, 386 Pa. 82; *Board of Public Education v. Intille & Deacon*, 401 Pa. 1; *Board of Public Education v. Watson*, 401 Pa. 62. This Court took note of the situation in *Board of Education v. Beilan*, 357 U. S. 399,

2 L. Ed. 2d 1414, 78 S. Ct. 1317, and see *Board of Education v. Soler*, 406 Pa. 168, as to which there has been or will shortly be filed a petition to this Court.

On May 31, 1961 the Court of Common Pleas of Philadelphia County reversed petitioner's dismissal on the dual grounds that:

1. The Superintendent asked no question.

2. At the Board of Education hearing petitioner fully answered all questions relevant to his prior and present loyalty.

On appeal to the Pennsylvania Supreme Court the Court of Common Pleas was reversed[1] on the grounds that:

1. It would have been futile for the Superintendent to ask questions for petitioner has stated that on advice of counsel he would not answer questions about his prior loyalty.

2. Petitioner's subsequent answering the Board of Education failed to overcome his prior statement to the Superintendent.

The point at issue in *Beilan* (*supra*) was whether the Board of Education was required to conduct any and all inquiries re loyalty under the Pennsylvania Loyalty Act, December 22, 1951, P. L. 1726 (65 P. S. 211) and was constitutionally prohibited from conducting such an inquiry under the guise of an incompetency inquiry under the Teachers Tenure Act, March 10, 1949, P. L. 30, Art. XI, Sec. 112 (24 P. S. 11-1122).

In *Beilan* (*supra*) this Court found no violation of due process.

Upon the completion of the litigation in *Beilan* (*supra*) three other teachers perfected their appeals. Their dismissals were reversed and their reinstatement ordered by the Pennsylvania Supreme Court, *Board of Public Educa-*

1. Five of the seven Justices concurred in the reversal. One Justice dissented, and one Justice, being ill, did not participate.

tion v. Intille & Deacon, 401 Pa. 1; *Board of Public Education v. Watson*, 401 Pa. 62. This Court refused to grant certiorari. The principal contention in that group of appeals involved the effect of teachers exercising their rights under the Fifth and First Amendments as witnesses before a Congressional Committee.

Petitioner raises questions not raised by *Beilan* (*supra*) or *Intille & Deacon* (*supra*) or *Watson* (*supra*).

METHOD OF RAISING CONSTITUTIONAL QUESTIONS.

In accordance with the applicable Statutes and Rules of Court, petitioner's appeal from the Pennsylvania Superintendent of Public Instruction to the Philadelphia County Court of Common Pleas included the filing of exceptions to the Superintendent's decision.

Those exceptions include the issues raised in this petition, in the following language:

No. 8:

> "The adjudication is erroneous in disregarding the statement of the Superintendent of Schools made at the hearing before the Board of Education that after Dr. Hoyer stated that he proposed to ask appellant questions, Dr. Hoyer did not thereafter make an appointment or other meeting and actually ask any questions which appellant refused to answer." (42)

No. 16:

> "The adjudication is erroneous in that it fails to note that the act upon which the discharge was based was the acceptance by appellant of the advice of counsel after appellant had been advised by Dr. Hoyer that appellant might seek the advice of counsel prior to answering any questions which Dr. Hoyer proposed asking, and that in fact Dr. Hoyer never did ask questions until after appellant had been suspended, and that the first time the questions were asked was at the

hearing of the School Board at which time appellant answered all questions." (44)

No. 7:

"The adjudication is erroneous in disregarding the fact that there was no refusal to answer questions asked by the Board of Education at appellant's hearing." (42)

The Board, not petitioner, appealed from the Court of Common Pleas to the Supreme Court of Pennsylvania.

In accordance with Pennsylvania practice that appeal was not based on or limited to submitted exceptions or questions save as stated in appellant's brief in the Supreme Court of Pennsylvania and thus are not part of the certified record.

Because those appeal questions are not part of the certified record they, to the extent relevant are set forth in the margin.[2] They in the order listed raise the issues of the instant Petition.

---

2. (1) "When the Superintendent has testified that he did not ask the teacher specific questions, but the teacher has also testified before the Board that the Superintendent did tell him that one of the questions was whether the teacher was a member of a specific branch and section of the Communist Party, and the teacher subsequently informed the Superintendent that he would not answer such questions, was the evidence sufficient to sustain the finding of the Board that the teacher was incompetent in refusing to answer the Superintendent's questions?"

(2) "When the Superintendent has informed the teacher that he desired to ask him questions regarding the teacher's loyalty and the teacher subsequently informed the Superintendent by telephone that on the advice of counsel he would not answer such questions, was the evidence sufficient to sustain the finding by the Board that the teacher was incompetent in refusing to answer the questions of the Superintendent?

(3) "When the teacher is charged with incompetency for failing to co-operate with his Superintendent by refusing to answer questions about former subversive affiliations, and the teacher testifies in his hearing on that charge before the Board as to his former subversive affiliations and their termination, is the Board required to exonerate the teacher of the charge of incompetency for refusal to answer the Superintendent?"

REASONS FOR GRANTING THE WRIT.

A.

This Court has recently, in *Koenigsberg v. State Bar of California*, 353 U. S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722; *Koenigsberg v. State Bar of California*, 366 U. S. 36, 6 L. Ed. 2d 105, 81 S. Ct. 997; *Re Anastaplo*, 366 U. S. 82, 6 L. Ed. 2d 135, 81 S. Ct. 978; *Cohen v. Hurley*, 366 U. S. 117, 6 L. Ed. 2d 156, 81 S. Ct. 954, and *Slagle v. Ohio*, 366 U. S. 259, 6 L. Ed. 2d 277, 81 S. Ct. 1076, been concerned with the failure to answer a question as an independent ground for exclusion, or as in *Cohen v. Hurley* (*supra*) and as here an independent ground for removal or dismissal.

In those stated Opinions this Court limited the exclusion or dismissal for failure to answer to situations in which:

(1) A relevant question was asked and there was a clear refusal to answer that question;

(2) There was an explicit warning that the failure to answer would or might be an independent ground for exclusion or dismissal.

(3) The exclusion or dismissal did not extend beyond the period of refusal, i.e., "We find nothing to suggest that he would not be admitted now if he decides to answer, . . . in short, the petitioner holds the keys to admission in his own hands." *In re Anastaplo* (*supra*).

Petitioner was dismissed on the independent grounds of refusal to answer a question in the absence of all three of the above stated limitations. Pennsylvania thus has extended the exclusionary rule, on the independent ground of a failure to answer a question, beyond the scope of the prior decisions of this Court.

Pennsylvania, as to petitioner, has applied that exclusionary rule even though there was:

(1) No evidence that petitioner was asked a relevant question which he refused to answer;

(2) No evidence that he was advised that his general refusal, on the advice of counsel, would be grounds for dismissal;

(3) Unrefuted evidence that when petitioner was first asked a question he answered in full.

In so doing Pennsylvania has permitted petitioner to be overreached.

We believe that extension of the exclusionary rule for refusal to answer is in conflict with this Court's Opinions in *Konigsberg* (*supra*), *Anastaplo* (*supra*) and *Cohen* (*supra*), and is in derogation of petitioner's constitutional right to due process.

B.

This Court, in *Garner v. Louisiana*, 368 U. S. 157, 7 L. Ed. 2d 207, 82 S. Ct. —, reaffirmed what it had held in *Thompson v. City of Louisville*, 362 U. S. 199, 1 L. Ed. 2d 654, 80 S. Ct. 624. "The ultimate question presented to us is whether the charges against the petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process clause of the 14th Amendment. The decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all."

This Court concluded that it is a denial of constitutional due process to convict in the absence of evidence supporting that conviction.

The Pennsylvania Supreme Court in affirming petitioner's dismissal, on the charge of incompetency for refusal to answer a question by the Philadelphia Superintendent of Public Education, erred as had the state courts in *Thompson* (*supra*) and *Garner* (*supra*).

This is so for there is no evidence that the Superintendent asked petitioner a question for at petitioner's Board of Education hearing the Superintendent testified:

"I did not ask Mr. August any question." (41a)

We believe that the petitioner has an equal right to constitutional due process at a hearing re his dismissal as did the defendants *Thompson* (*supra*) and *Garner* (*supra*) in their respective criminal trials.

As succinctly stated by Justice Cohen in his dissent, petitioner was not dismissed for refusal to answer but was dismissed upon a "mere suspicion of refusal" which "is not sufficient; there must be an actual refusal to answer to constitute incompetency . . ." "Human beings change their minds. A teacher must be given the opportunity at a scheduled interview to refuse to answer, and must be on notice that his refusal will constitute incompetency. Any other position does violence to the Due Process causes of both the United States and Pennsylvania Constitutions" (39).

Respectfully submitted,

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Appendix.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

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MUSMANNO, *J.*

The fidelity, candor and intellectual honesty which a school teacher owes to the public school system of which he forms a part is the subject matter of this appeal. The precise issue is whether a school teacher who refuses to cooperate with the school superintendent in an inquiry on the matter of loyalty to the United States may be dismissed on the ground of incompetency, which is one of the reasons assigned in the School Code for dismissal.

The facts leading up to a determination of that issue may be summarized as follows.

In 1934 Bernard August was engaged as a teacher in the Philadelphia public schools and assigned to the Gratz High School, teaching mathematics. In 1943 he was transferred to the Olney High School, continuing to teach the same subject. In that same year he joined the Communist Party, actively participating in its program. In time he became the financial secretary of the Northeast branch of the Communist Party; collecting dues from fellow-members and transmitting the money to Communist central headquarters.

On October 14, 1952, he was summoned to the office of the Superintendent of the Philadelphia Public Schools, Dr. Louis P. Hoyer, who informed him that he had some questions to put to him on the subject of loyalty. August replied that he would not answer questions and wanted to consult with his attorney. Eight days later, October 24, 1952, he

called Dr. Hoyer by telephone and informed him that he had been advised by his attorney that he was not required to answer questions on the topic mentioned by Dr. Hoyer, namely, loyalty.

On November 20, 1953, Superintendent Hoyer gave August an unsatisfactory rating as school teacher, particularly marking him deficient under the headings of professional relationship, judgment, professional attitudes, civic responsibility and appreciation of ideals. Five days later the Board of Public Education suspended him as a teacher, preferring charges against him on the grounds of incompetency and persistent wilful violation of the school laws of Pennsylvania.

On February 17, 1954, he was called before the House Un-American Activities Committee to testify regarding his Communist membership. He refused to answer questions, pleading the First and Fifth Amendments of the Federal Constitution.

On March 22, 1954, the Board of Public Education of Philadelphia conducted a public hearing into the charges it had brought against August and, on April 12, 1954, ordered his dismissal as a school teacher. He appealed to the Court of Common Pleas of Philadelphia County which reversed the decision of the Board and ordered his reinstatement. The Board appealed to this Court.

A decision filed during this session in the case of *Board of Public Education, School District of Philadelphia v. William G. Soler*, Pa. , holds that a school teacher who refuses to answer relevant questions put to him by the Superintendent of Public Schools makes himself liable to a charge of insubordination and incompetency and may, in consequence, be dismissed from his employment even though the questioning is directed to the matter of loyalty. This decision follows the ruling in the case of *Board of Public Education v. Beilan*, 386 Pa. 82, which was affirmed by the Supreme Court of the United States (357 U. S. 399). It was argued in the Court below in the *Soler* case, as well as

in the case at bar, that the *Beilan* precedent had been overruled by the decisions of this Court in the cases of *Board of Public Education v. Intille*, 401 Pa. 1, and *Board of Public Education v. Watson*, 401 Pa. 62.

But it is quite evident that the *Intille* and *Watson* decisions in no way affected the *ratio decidendi* of the *Beilan* decision. The statements in *Intille* and *Watson* which suggest anything to the contrary were dicta voiced by the opinion writer and, as stated today in the *Sober* decision, are disavowed.

Thus, the law is settled definitively and conclusively that when a school teacher refuses to answer questions which are put to him by the Superintendent of Schools or any other authoritative school superior concerning his fidelity to the United States, the School Board may proceed against that teacher under the provisions of the Public School Code of March 10, 1949, P. L. 30, Section 1222 et seq., as amended, 24 P. S. Section 11-1122 et seq., and is not limited to the procedure designated in the Pennsylvania Loyalty Act (also known as the Pechan Act) of December 22, 1951, P. L. 1726.

This ruling does not mean, as suggested by counsel for the appellee, the dismantling of the machinery set up in the Pechan Loyalty Act. If a school superintendent, while interviewing a school employee, ascertains that he is or was a member of the Communist Party, and the evidence warrants further action, the Superintendent then turns to the mechanism of the Pechan law.

Any initial interrogation on loyalty in no way conflicts with the purposes of the Pechan Act. A school superior certainly has the right to ask a teacher whether he has ever engaged, for instance, in the sale of narcotics. He possesses no less authority to inquire whether the teacher ever belonged to an organization committed to the overthrow of our government by force and violence.

No one could reasonably deny to the Superintendent of Schools the authority to question an employee, when there

is reason to support the inquiry, whether the employee has committed any crime, or conducted himself in any manner, inimical to the best interests and welfare of the children in the school where he is employed. If the Superintendent asked a teacher whether he had committed arson and the teacher refused to answer, could it be maintained that the school authorities would not have the right, and the obligation, to dismiss the teacher on the basis of incompetence? Is burning down a dwelling any less culpable and reprehensible a deed than taking an active role in an organization committed to destroying the house of democracy, designed by the architects of the Constitution and built by all Americans since 1776?

Despite arguments to the contrary by the appellee, the procedure followed by Dr. Hoyer in the case at bar better protected, in limine, Bernard August from any unjust imputation than would a grinding of the Pechan machinery. The conference conducted by Dr. Hoyer was a private one, so that August was spared all embarrassment or public harassment. If, however, instead of this initial investigation, the Loyalty Act had publicly taken hold, and it had developed later that August was entirely innocent, he might still suffer from the effects of passing through the Pechan machinery, which, even with expert hands at the control, could well have left him with bruises and hurts.

Thus, it is self-delusion to argue that somehow the appellee in this case, or any school employee, would be better off, when a question arises as to loyalty, to be taken immediately into the mechanics of the Pechan Act.

And then, aside from what the procedure, in either event, means to the employee, the proper administration of the schools demands a prompt personal inquiry into equivocal conduct on the part of an employee. In explaining why he called August for questioning, Dr. Hoyer said:

> "I considered it important, first of all, because I wanted to discover, if I could, by conference and by conversation with Mr. August, whether or not the

> facts indicated in the statements regarding August's membership in the Communist Party were correct, and also whether the relationships indicated in the questions had persisted to the present time. I considered them important also, or considered my desire important, because *they had bearing, in my estimation, on the fitness of Mr. August to be a teacher in the Philadelphia Public School System* and it is my responsibility to make certain that the teachers who come into the Philadelphia school system or who remain in it *are fit persons to be there.* (Emphasis supplied.)

Such a declared purpose can only be commendable. Any superintendent, who would allow statements, or even rumors, of disloyalty to go uninvestigated, would be derelict in the performance of his duties. A ship captain who learns that a member of his crew is making statements about mutiny or is indifferent to his responsibilities for the safety of the vessel, would be a traitor to his own responsibilities if he did not call in that crew member and demand to know if there was truth to the circulating report.

In the *Soler* case the school teacher was dismissed because he failed to reply to questions advanced by the Superintendent of Public Instruction. He maintained, as August maintains here, that the procedures providing for dismissal under the Peehan Act are mandatory and exclusive. Chief Justice Bell disposed of the Soler contention with the statement that "appellee was not dismissed on the ground of disloyalty; he was dismissed on the ground of *incompetency* because of insubordination and lack of frankness, candor and intellectual honesty."

Justice Frankfurter, in his Concurring Opinion in the *Beilan* case, *supra*, and the case of *Lerner v. Casey*, 357 U. S. 468, said:

> "When these two employees were discharged, they were not labeled 'disloyal'. They were discharged because governmental authorities, like other employers,

sought to satisfy themselves of the dependability of employees in relation to their duties. Accordingly, they made inquiries that, it is not contradicted, could in and of themselves be made. These inquiries were balked. The services of the employees were therefore terminated."

It thus is settled law in this State that a school employee owes the duty of frankness to his administrative superior; and is obliged to cooperate. To repeat the words of Chief Justice Bell, a school employee may be dismissed because of "insubordination and lack of frankness, candor and intellectual honesty."

Was Bernard August insubordinate? Did he exhibit a lack of frankness, candor and intellectual honesty in his dealings with his administrative superior? Essentially that is the key which opens the lock on the answer to the question involved in this appeal.

In the case of *Albert Appeal*, 372 Pa. 13, Chief Justice Stern said:

"The Constitution of the Commonwealth, Article 10, Section 1, provides that 'The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools.' Certainly our public school system is the most vital feature of our governmental and democratic system. In order to have such a 'thorough and efficient system' those who teach in the public schools must be persons not only of learning and ability, of character and integrity, but they must be devoted to our country, its institutions and the basic principles upon which it was founded and hopefully will ever rest . . .

It is essential, in order to protect our children from treacherous influences, that persons who advocate or participate in subversive doctrines should not be employed, or if employed should not be retained, as

> teachers in our public schools, and any teacher dismissed for such a reason cannot properly claim that any constitutional or legal right is thereby violated."

When Superintendent Hoyer was informed that one of his teachers was participating in subversive doctrines he proceeded to determine at once the true facts by talking to the school teacher himself. He was entitled to cooperation from him, in accordance with the mandates of the Constitution and the laws of the Commonwealth. Did he receive it?

The Court below held that August did give that cooperation. This conclusion on the part of the Court, in the face of the record, suggests a complete blotting out of the vast forest of fact because of a few scraggly trees of sophistry. The Court quoted from Dr. Hoyer's testimony and from the indicated quotation, found that Dr. Hoyer did not ask August any questions at the first interview and that, therefore, August could not reply. It is true that, taken apart from everything else in the record, one could read from replies made by Dr. Hoyer, in one circumscribed part of the record, that August was not questioned. However, when one reads the entire record it becomes as plain as a pikestaff that August was under interrogation at that first interview. Otherwise, why did he tell Dr. Hoyer that he would speak to his counsel before he decided whether he would answer questions put by Dr. Hoyer? In fact, the school teacher himself, Bernard August, testified that Dr. Hoyer questioned him. Here is his testimony:

> "When I came into the room, Dr. Hoyer . . . said that he had received certain information which he felt it was his duty to *question me about* . . . He said, *I have certain questions that I want to ask you.* I said, What type of question? I would like to know what the questions are before I undertake to answer them . . . Mr. Soken, [Counsel for Philadelphia School Board] who was present, interrupted to say that there was no

reason why I had to know what the questions were before I agreed to answer or refused to answer. Dr. Hoyer, however, very politely said, *I see no harm in letting him hear one of the questions.* And the question was something to the effect, there is sworn testimony, or something like that, to the effect that you were a member of the North Philadelphia branch of the professional section of the Communist Party of Philadelphia. And I said, well, *I would not undertake to answer questions of that sort without first consulting an attorney.*" (Italics supplied.)

Thus, Dr. Hoyer did put at least one question, and it was only because of August's refusal to answer, that more were not forthcoming at that time.

The Court misread the record in another connection. It said:

"No second interview was ever arranged, neither at that time nor at any subsequent time."

Here is Dr. Hoyer's testimony on that phase of the case:

"Q. Doctor, why was there a second conference arranged for?

A. *The second conference was arranged* because Mr. August had indicated his desire to consult counsel, and of course I agreed to his request. (Emphasis supplied.)

Thus, a second conference *was* arranged. It did not blossom on the tree of reality because August killed the roots of the tree with the frost of his defiance and hostility. He telephoned Dr. Hoyer and informed him that he would not answer the questions which Dr. Hoyer wished to address to him.

But the lower Court argued:

"The mere receipt of a telephone call which purports to set up a future course of conduct, which course of

conduct was never tested, cannot be sufficient cause for dismissal. Mr. August should have been afforded the opportunity to meet face to face with his superior and upon notice of the possible result of his persistent refusal, be given the opportunity to reach a decision."

This argument would suggest that Mr. August is a child. When he told Dr. Hoyer that he would not answer questions, after he had already had eight days to consider whether he would answer or not, certainly Dr. Hoyer could assume that August would not answer questions. It would have been an infantile performance to prepare the stage for another conference, in the face of August's refusal to answer, and then on that stage of futility for Dr. Hoyer to attempt by cajolery, persuasion and implied threat to get August to answer.

August was no naive babe in pedagogic woods. He was a college graduate, he had been a teacher for eighteen years. He knew English and he knew that Dr. Hoyer knew English. Then when he, with the finality of an ax stroke, told Dr. Hoyer he would not answer questions, a "face to face" meeting on the same subject, as desired by the lower Court, would not only be superfluous but inane and fatuous.

It is a strange argument which criticizes Dr. Hoyer for not giving to August what he spurned. August did not want another conference, because he knew that Dr. Hoyer intended to talk to him, not on the state of the weather, but on the state of his attachment to Communist ideology. Reflecting on the possibility of such a "face to face" interview, he saved face, as he undoubtedly thought, by staying away. The record is clear that it was August who torpedoed the first conference and it was he who sank all possibility of a second conference by telling Dr. Hoyer that to all questions on the question of loyalty he would stand mute. Although he indicated to Dr. Hoyer he would be deaf to all questions, it was very clear that in his line of reasoning he was not dumb. The following episode will illustrate.

At the conference on October 14th Dr. Hoyer told August that he intended to read certain statements to him about his activities involving loyalty, and he would then ask August to confirm or refute those statements. August said he would not answer the questions and then added: "Why should I admit anything before I see whether you can corroborate it?" This is like a person charged with larceny, who, being asked whether he has the purse of the victim in his pocket replies: "I refuse to answer that question until I find out if you have any evidence I have the purse."

In this very exchange with Dr. Hoyer, August exposed his lack of candor and deficiency in those qualities of professional attitude, civic responsibility and appreciation and ideals on which Dr. Hoyer later rated him adversely. August's wanting to know what evidence had been gathered on his Communist activities so that he could avoid making damaging admissions on matters which could not be proved against him, was indeed a cunning piece of strategy, but a strategy which proved him to be more shrewd than faithful.

Bernard August further objected to Dr. Hoyer's questioning him because he said, such questioning was "un-American" and "unfair." This is another demonstration of August's lack of appreciation of the duty he owed his school superiors. He explained that he did not need to answer because Dr. Hoyer wanted to question him about his "political activities." Only a person as separated from the history of the times as a shipwrecked sailor on an ice floe in the Arctic, only a person at war with all reality and living in a state of sheer perversity, only a person with a brain so enslaved to Communist ideology that he is deaf, dumb and blind to the cruelties, inhumanity, and bestial greed of Communism, as decreed by the Kremlin and enforced by bayonet, bomb, treachery, barbed wire and stone walls throughout the world, could say that membership in the Communist Party may be equated with what in the United States we regard as "political activities."

The Communist Party is not a political party; it is a criminal conspiracy designed and determined to destroy democratic government everywhere but particularly in America. This objective of the Communist Party has been officially pronounced by Congress, by the Pennsylvania Legislature, by the Federal Courts and by the Pennsylvania courts. This fact, although it looms against the horizon of contemporary history as clearly as the Rocky Mountains, the Empire State Building, and the Washington Monument, yet needs to be repeated because there are still supposedly educated people who will insist, as did the appellee in this case, that to dip one's hands to the armpits into the muck of Communist ideology is only an exercise of one's rights to participate in political activities."

The Internal Security Act of 1950 (Public Law 831, 81st Congress, Chapter 1024—2nd Session) declares:

> "The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the World Communist Movement itself, present a clear and present danger to the security of the United States and to the existence of American institutions."

The Pennsylvania Act of December 21, 1951, P. L. 1712 proclaims that:

> "Upon evidence which has been presented and proof which has already been established before the Congress of the United States, the federal courts of the United States, the courts of the Commonwealth of Pennsylvania, and the General Assembly of the Commonwealth of Pennsylvania, there exists an international revolutionary Communist conspiracy which is committed to the overthrow by force and violence of the government of the United States and of the several states, such con-

spiracy including the Communist Party of the United States, its local components and *the members thereof.*" (Emphasis supplied.)

In *American Communications Ass'n v. Douds*, 339 U. S. 382, 425, Justice Jackson said:

> "The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate . . . It purposes forcibly to recast our whole social and political structure after the Muscovite model of police-state dictatorship. It rejects the entire religious and cultural heritage of Western civilization, as well as the American economic and political systems."

In the case of *Powell v. Unemployment Compensation Board of Review*, 146 Pa. Superior Ct. 148, 150, the Superior Court said:

> "Courts have long recognized and have taken judicial notice that Communism, as a political movement, is dedicated to the overthrow of the government of the United States (and, with it, the governments of the States as necessary incidents in our system of divided sovereignty . . . Destruction of other existing governments by violence is not the subject, merely, of a secret pact among Communists; it is the vaunted objective of the party openly declared by its recognized spokesmen."

All these pronouncements were made *prior* to the meeting of Bernard August with Dr. Hoyer on October 14, 1952, and the telephone conversation of October 22nd, so that it cannot be argued in behalf of August that he was unaware of the gravity of the charge of having been a member of the Communist Party and that, therefore, he could not know how important it was that Dr. Hoyer question him on his Communist affiliations.

In view of these above-mentioned authoritative pronouncements on the seriousness of Communist activity, August owed a bounden duty to his administrative superior in the Philadelphia school system to work with him in his investigation of Communist infiltration into that school system. Instead of lending his services to the Superintendent, he turned his back on the investigation. His flat refusal to assist Dr. Hoyer in obtaining information on matters peculiarly within his own knowledge amounted to insubordination as well as lack of frankness, candor and intellectual honesty which added up to incompetence.

However, aside from August's knowledge in 1952 of what the Communist Party stood for, he knew even before he joined the Communist Party that it was a fang in the jaws of the dragon of the worldwide Communist criminal conspiracy to destroy democratic government in the United States.

In his testimony before the School Board, August said that he joined the Communist Party in 1942 and left it in 1950. Long prior to 1942 he, as an educated and reasonably informed man could not be ignorant of the subversive program of the Communists in the United States.

As early as 1928, the notoriously outstanding and unlamented late leader of the Communists in the United States, William Z. Foster, declared from red-festooned platforms throughout the country:

> "When a Communist heads a government in the United States, and that day will come just as surely as the sun rises; that government will not be a capitalistic government, but a Soviet government, and behind this government will stand the Red Army to enforce the dictatorship of the proletariat." *

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* While Foster lay ill in a Moscow hospital whither he had traveled because he said that the Soviet hospitals were better than the American ones, Khrushchev honored him, and perhaps hastened his death, by visiting him at his bedside.

As early as 1930, the United States House of Representatives conducted a thorough investigation, with extended hearings, on Communism in the United States. On January 17, 1931, the Committee of the Whole House reported that Communists advocate:

"Hatred of God and all forms of religion."

"Destruction of private property, and inheritance."

"Revolutionary propaganda through the Communist International stirring up Communist activities in foreign countries in order to cause strikes, riots, sabotage, bloodshed, and civil war."

"Destruction of all forms of representative or democratic governments, including civil liberties, such as freedom of speech, of the press, of assembly, and trial by jury."

There must be utterly excluded any possibility, unless it be decided that Bernard August is wholly devoid of intelligence and is a babbling moron, that he was not fully informed of the conspiratorial and revolutionary character of the Communist Party at the time he joined it and remained within its ranks. At the hearing in the *Albert* case, supra, there was placed in evidence a sample membership card of the Communist Party which set forth the rights and duties of Party members as follows:

"To attend club meetings, *read the Party press and literature*, pay dues regularly and be active on behalf of the program and policies of the Party. To participate in working out all policies and tasks of the club and to regularly examine the execution of such policies. To strive to master the program and policies of the Party, the principles of Marxism-Leninism." (Emphasis supplied.)

In reading the "party press and literature" August perforce read and perhaps memorized the Communist Manifesto which vividly and belligerently trumpets its battle cry of revolution and bloodshed:

> "The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communist revolution."

The Communist Manifesto was published in 1848, ninety-four years before August became a member of the Communist Party, so that its exhortation to violence was common knowledge long before August vowed allegiance to the red flag and the hammer and the sickle.

But, aside from what August learned through his studies of Communist literature and fraternizing with Communists for eight years, he was thoroughly aware when he joined the Communist Party that he was defying the law of the Commonwealth of Pennsylvania, his employer, and to which he had pledged allegiance.

The Act of July 28, 1941, P. L. 530, forbade the employment in any capacity, by any agency or the Commonwealth or any county, city, borough, township or school district, of any person who advocated or participated "by an overt act or acts in un-American or subversive doctrines." Any person so employed was to be dismissed in the same manner as provided by law for dismissals for other causes.

The School Code of 1949, in reenacting this provision, omitted the words "by an overt act or acts," thus obviously demanding a more rigorous standard of loyalty in respect to teachers than for other public employees.

The Act of 1941 gave a general definition of the phrase "un-American or subversive doctrines" as "doctrines which teach or advocate the overthrow of the government of the United States or of the Commonwealth of Pennsyl-

vania by revolution or the changing of the form of government of the United States or of the government of Pennsylvania by means not provided for in the Constitution of the United States or in the Constitution of the Commonwealth of Pennsylvania."*

Thus, from 1942 to 1950, August was an active member of an organization which taught and advocated the overthrow of State and National governments by unconstitutional methods. He, of course, kept his Communist membership a secret from his employer. Had that membership been disclosed, he would have been subject to immediate dismissal, as Dorothy Albert was dismissed. Thus, for eight years, August wore the mask of deception, appearing to be a law-abiding citizen when in fact he was not. For eight years he wore a cloak of fraud, appearing before the school children of Philadelphia as a person whose conduct and behavior could be emulated as manifesting the highest type of citizenship, whereas, in fact, he was working with others to destroy that school system which he had pledged and sworn to uphold.

This deception is not extraordinary because Communists are instructed through Lenin's teachings that "it is necessary . . . to resort to all sorts of devices, maneuvers, and illegal methods, to evasion and subterfuge."**

For eight years August practiced his deception, looking toward the day when, under the Communist revolution in the United States, according to William Z. Foster,

> "The studies will be 'revolutionized,' being cleansed of religious, patriotic, and other features of the bourgeois ideology. The students will be taught on the basis of

* The Act of 1941 and section 1122 of the Public School Code of 1949 were in effect throughout the entire period August was a member of the Communist Party.

** U. S. Govt. Printing Office, Committee Print, 84th Cong. 1st Sess. December 21, 1955, p. 13.

Marxian dialectical materialism, internationalism, and the general ethics of the new Socialist Society.'"

August testified before the School Board that he never attempted to teach Communism to his pupils. But this is a self-serving statement. The *Communist* magazine of May, 1937, reminded its teachers:

> "Communist teachers are, therefore, faced with a tremendous social responsibility . . . They must take advantage of their positions without exposing themselves . . . Only when teachers have really mastered Marxism Leninism will they be able skillfully to inject it into their teaching at the least risk of exposure."

Dr. Bella Dodd, former Communist teacher and state legislative director of the Communist Party in New York, testified at a House Committee hearing:

> "The Communist teacher is very clever at putting over the Communist ideology. You'd be surprised at how some of the great heroes of America have been perverted in the interests of Communism."

When she was asked by committee counsel if she felt she had influenced students along the Communist line, she replied: "I would have been a very poor Communist if I didn't."*

This recital of Communist history, methods and procedure is presented not for the purpose of establishing that August's dismissal was justified on the basis that he was a Communist, but to show that he was aware of what the Communist Party, of which he was an active member, was doing, and that he owed to his administrative superior the duty to divulge the information he possessed about the Communist Party, especially in connection with himself. His refusal to do so constituted, as already stated, "in-

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* Hearings, House Un-American Activities Committee, Hearings Feb. 25, 27, 1953, p. 30.

** Philadelphia Bulletin, November 25, 1953.

subordination and lack of frankness candor and intellectual honesty."

His intellectual dishonesty was established quite decisively not only by his attitude toward Dr. Hoyer but in his appearance before the School Board. Despite the Himalayan pile of documentary evidence to the contrary he testified that while he was a member of the Communist Party it was a "legal political party in the United States and the Commonwealth of Pennsylvania." He said further that while he was a member of the Communist Party, the Communist Party appeared "on the official state ballot of Pennsylvania." This is a total falsehood.

Section 801 of the Act of July 28, 1941, P. L. 526 provides, inter alia:

> "The words 'political party' and the words 'political body', as hereinabove defined, shall not include any political body, political organization or political body composed of a group of electors, whose purposes or aims, or one of whose purposes or aims, is the establishment, control, conduct, seizure or overthrow of the Government of the Commonwealth of Pennsylvania or the United States of America by the use of force, violence, military measures, or threats of one or more of the foregoing."

Section 976 provides, inter alia:

> "No nomination petition, nomination paper or nomination certificate shall be permitted to be filed, if the political party or political body referred to therein shall be composed of a group of electors whose purposes or aims, or one of whose purposes or aims, is the establishment, control, conduct, seizure or overthrow of the Government of the Commonwealth of Pennsylvania or the United States of America, by the use of force, violence, military measure or threats of one or more of the foregoing."

The Communist Party has not appeared on the state ballot in Pennsylvania since 1940.

August endeavored to convey the impression that during the whole time he belonged to the Communist Party it participated in no illegal activity. He said that he did not leave the party because of any conviction it was part of any conspiracy. His whole attitude was that the school authorities were in the wrong, and not he, because of the events of which he was the principal character. When he was asked by counsel for the School Board: "Who got you into the Communist Party?" he refused to answer the question and then said that his name had been put through a "smearing." And then, in self-justification, he added: "I did nothing to bring this upon myself that I consider in any way a disgraceful act."

He still refused to acknowledge that there was any turpitude involved in his being a member, for eight years, of an organization working against the welfare, the interests, the ideals and perhaps even the survival of the American people. It was during the years that August was a member of the Communist Party that it perpetrated many of its most perfidious deeds.

During this period the Communists stole the secret of the atomic bomb from American laboratories and turned it over to Russia; Alger Hiss and other traitors bartered government secrets to the Soviet Union; Communists penetrated into the State Department, Justice Department, the Armed Forces; they took over many labor unions employing workmen engaged in building submarines, radars, electric machinery, all vital to the nation's defense; they polluted many of the literary, artistic, radio and cinematic streams for Soviet propagandistic purposes. Internationally (and the Communist Party of the United States is an integral part of the world-wide communist conspiracy) the Communists perpetrated aggressions against many unoffending and helpless nations; they illegally seized lands and countries; they enslaved peoples in all their vast do-

mains; they eventually acquired a total of one-fourth of the earth's land surface and one-third of its population. It was during those eight years when August could see no wrong in the Communist Party in Philadelphia of which he was a financial secretary, that his Communist comrades in Europe were shooting down and killing unarmed American flyers, imprisoning other American flyers and, by establishing a blockade of Berlin, bringing about the death of still more American flyers.

The Communist Party in the United States, of which August was a part, approved and supported these outrages.

It would not be an illogical conclusion that when August was questioned by Dr. Hoyer he still believed in the Communist cause since he refused to give information which would help Dr. Hoyer to ferret out other Communists in the school system. He declined to assist the authorities in locating the Communist teachers who were still in a position to poison the very fountain of learning at which the school children of Philadelphia drank.

The lower Court states that August is entitled to *locus poenitentiae*. It would seem that the Court interprets this phrase to mean a pardon, which, of course, it does not. *Locus poenitentiae* literally means a place of repentence but generally it is used to indicate an opportunity to undo what has been done. Bouvier's Law Dictionary defines the phrase as "a chance afforded to a person, by the circumstances, of relinquishing the intention which he has formed to commit a crime, before the perpetration thereof." But August's offense has already been committed, so that there is no way for him to relinquish the intention of doing what is a *fait accompli*.

Black's Law Dictionary defines *locus poenitentiae* as:

> "The opportunity of withdrawal from a projected contract, before the parties are finally bound; or of abandoning the intention of committing a crime, before it has been completed."

August's offense was completed when he refused to show candor and intellectual honesty in dealing with his superior, Dr. Hoyer. August acted improperly for eight years and then when he was politely asked by his superior to tell about those eight years he charged Dr. Hoyer with being un-American and unfair! How can a school system be operated with any degree of efficiency, order and success if school teachers do not show respect toward the Superintendent of the school, the man who has the responsibility of maintaining order? How can children be expected to show respect toward their teachers if they learn that the teachers themselves are disrespectful to *their* superiors? Communists are always questioning the motives, the sincerity and the actions of government officers—whether in legislative, judicial or executive departments—but when they in turn are questioned they protest that their rights are being infringed upon, and that their liberties (which they deny to others) are being usurped.

The lower Court seems to be of the belief that it is enough for an offending teacher to express regret and the damage which has been done by his offense will be repaired. No one can gainsay that mercy is a virtue and forgiveness is divine, but it is not within the province of the Court of Common Pleas to act as a celestial Pardon Board. It would be extremely dangerous to countenance a practice which would allow a teacher to ignore the superintendent, flout his orders, defy his directions and spurn his authority, assured that if nothing untoward happens to the teacher he has gained everything, and if, on the other hand, he is charged with being contumacious and his job becomes endangered then he may call for a convening of the School Board (which means drawing from their respective offices, businesses, professions and other activities some score of persons) and tell them what he refused to tell the Superintendent.

The Philadelphia school system employs eight thousand teachers. The chaos which would follow the approval

of such a practice is appalling to contemplate. No large organization can survive without orderly procedure and gradation of responsibility. Discipline is required not only in the military. It is indispensable in every establishment in civilization if anarchy and catastrophe are to be avoided.

What would happen in the transportation world (particularly the airlines and the railroads) if subordinate employees could freely refuse to carry out orders, the execution of which means the safety of countless lives? What shambles would occur in hospitals if nurses and attendants could refuse to obey the directions and prescriptions of surgeons and doctors? What would happen to all organized society if government employees could close their eyes to directives which control the intermeshing of the vast complicated gears of governmental machinery?

The lower Court says that locus poenitentiae *is* (emphasis in Court's opinion) present in this case because—

> "Mr. August sent a letter through his attorney to the School Board on December 16, 1953, offering to answer all questions that might be put to him by the School Board or its counsel."

It is difficult to understand how the Court sees any penitence in this maneuver on the part of "Mr. August." There is scarcely a criminal who, upon being caught and facing certain conviction, does not want to undo what he did, so as not to undergo the penalty which exceeds the gain he thought he might have achieved. And then, the Court makes no mention of the startling chronology in this matter of the letter. When it was sent, August had already been suspended and charges of incompetency had been filed. *Fourteen months* had expired since the date of his offense. In all this time he never attempted to supply Dr. Hoyer with the information which had been requested of him.

It is perfectly obvious that August's assumed penitence was a sham and a pretense. One who truly sorrows

for having burnt down his neighbor's house does not wait until the neighbors have been made ill from exposure to rain, storm, snow and ice before he takes tools and timber to rebuild what he destroyed. Even so, August could not rebuild with a few drops of ink the house of character which he had himself brought down in ruins by turning his back on his administrative superior when that superior, with good intention and kind words, asked him to take the superior into his confidence.

And then, as a grotesque sequel to a grotesque counterfeit show of remorse, it is to be noted that the letter was not written by August but by his lawyer and the letter never even reached the School Board because it was misaddressed!

Even if the Court of Common Pleas had the power to save Bernard August from the dismissal ordered by the School Board on its mistaken concept of locus poenitentiae, an exercise of such power could not be sustained because the record would not support it. It is not a simple matter for one to betray his government and his fellow-countrymen for eight years, then arrogantly to defy authority when called to account, then to accuse the offended party with "smearing" tactics, and then for the guilty person to expect to be restored to a position of trust which involves the teaching of children, the future citizens of America, on the strength of the writing of a misdirected, impenitent letter which, tortoise-like, takes fourteen months in its preparation, and then finally sets off in the wrong direction to an incorrect destination. The offense committed by August and written large on the blackboard of his school, cannot be wiped away with so blundering, insincere and misdirected an eraser.

The record in the case overwhelmingly establishes, with a plethora of fact and law, that the Superintendent was not only warranted but compelled by law to suspend Bernard August as a result of his conduct, the School Board was warranted in dismissing him because of that miscon-

duct, and the Superintendent of Public Instruction was equally warranted in law in affirming the action of the School Board.

The order of the Court of Common Pleas No. 6 of Philadelphia County is, therefore, reversed, and the action of the Superintendent of Public Instruction in sustaining the dismissal of Bernard August as a professional employee, is affirmed.

Mr. Justice Jones files a Concurring Opinion.

Mr. Justice Cohen files a Dissenting Opinion.

DISSENTING OPINION OF COHEN, J., OF THE SUPREME COURT OF PENNSYLVANIA.

FILED: January 17, 1962.

COHEN, *J.*

Once again, as in *Board of Public Education v. Soler*, — Pa. —, — A. 2d — (1962), a majority of this Court has misinterpreted the effect of *Board of Public Education v. Intille*, 401 Pa. 1, 163 A. 2d 420 (1960) and *Board of Public Education v. Watson*, 401 Pa. 62, 163 A. 2d 60 (1960) and has overlooked the basic distinction between an incompetency interview and a loyalty proceeding. In this case, moreover, my colleagues have compounded the error by broadening the meaning of "incompetency" even beyond the encompassing interpretation given that word in the recent *Soler* opinion.

The majority opinion in the present case indicates further misunderstanding of the laws of both the United States and the Commonwealth of Pennsylvania by suggesting that *Intille* and *Watson* in no way affected the interpretation given by this Court to "incompetency" in *Board of Public Education v. Beilan*, 386 Pa. 82, 125 A. 2d 327 (1956), affirmed 357 U. S. 399, 409; 2 L. Ed. 1414, 1433, 78 S. Ct. 1317, 1324 (1958). In affirming *Beilan*, the U. S. Supreme Court held only that the interpretation of "incompetency" given by this Court "is not inconsistent with the Federal Constitution," (357 U. S. at 408). This decision in no way precluded our Court from changing the interpretation of "incompetency," as we did in *Intille* and *Watson*.

The majority here asserts that under the *Soler* decision, a teacher's refusal to answer questions asked by his administrative superior concerning his loyalty constitutes "incompetency" within the meaning of the Public School Code of March 10, 1949, P. L. 30, Section 1122 et seq., as amended, 24 P. S. 11-1122 et seq., and that the only issue involved herein is whether appellee's behavior fell within the judicial

proscription. One need only glance at the lengthy opinion of the majority to realize that the real, indeed the sole, question in this case concerns appellee's loyalty. If the majority is concerned with incompetency, there is no relevancy in the detailed history of the Communist conspiracy in this country and abroad. Similarly, if incompetency is the only question involved, the majority's attack on the appellee for his affiliation with Communist organizations is unnecessary.

It is ironic that August's alleged incompetency does not arise out of his membership in Communist organizations. Indeed, he cannot be discharged for such membership under the Public School Code of 1949, but must be proceeded against in compliance with the Pennsylvania Loyalty Act (Peehan) Act of 1951, Dec. 22, P. L. 1726, as amended, 65 P. S. 211, et seq. Notwithstanding, the majority holds, in defiance of logic, that appellee's mere refusal to answer his superior's questions concerning this membership, in and of itself, constitutes incompetency.

What, says the majority, is the difference between a refusal by a teacher to answer questions posed by an administrative superior concerning loyalty and questions concerning immoral or criminal behavior? Under the Pennsylvania statutes there is a very crucial distinction. Unquestionably, a teacher's refusal to answer his superior regarding alleged immoral or criminal activities would constitute insubordination and fall within the definition of incompetency under the Public School Code of 1949, 24 P. S. 11-1122. I agree thoroughly that a school board is entitled to candid answers from its employees and that it can terminate the employee's status on the ground of incompetency if such answers are not forthcoming. Since the Public School Code of 1949 does not provide a specific procedure to guide the administrative superior in questioning teachers regarding these matters, the professional interview is the proper—indeed, the only—place for the superior to obtain this information.

Concerning loyalty, however, the Legislature has established a detailed statutory procedure to assist the administrative officer to obtain necessary information under conditions safeguarding the teacher's interests. For this reason, questions regarding loyalty were excepted by the explicit provisions of the Pechan Act from the matters permitted to be raised in an incompetency interview. In this one area, therefore, the Public School Code of 1949 has been preempted by the Pechan Act.

The title of the Pechan Act states, "An act relating to the loyalty to the United States and the Commonwealth of Pennsylvania of public officers and employes, including teachers and other employes of the public school system . . .; prohibiting appointment or employment and requiring discharges after hearing in certain cases . . . ."

Moreover, Section 15 of the Act, 65 P. S. 225, provides:

"*Effect and Applicability of Act*

(a) The provisions of this Act shall not affect the right . . . to discharge *any person for any cause other than those provided for by this act* or without cause under existing law . . . ." (65 P. S. 225) (Emphasis supplied.)

The majority states that its interpretation of the Pechan Act will not render the law impotent and meaningless. It then attempts to justify August's dismissal, patently based on the substantive grounds of disloyalty without the corresponding safeguards of the Pechan Act, on the basis that the sole question raised at the interview was that of incompetency and that, consequently, the statutory requirements for a loyalty inquest were unnecessary and inapplicable. Such a position misconstrues the basic meanings of *loyalty* and *incompetency* and constitutes an indiscriminate interchanging of these very distinct words.

The Legislature in enacting the Pechan Act was well aware of the charged atmosphere in which the Act was to be applied. Consequently, to be discharged under the Act,

a person must be determined to be a "subversive person" by a "fair preponderance of the evidence." 65 P. S. 217. The difficulty which a School Board might have in meeting the rather rigorous burden imposed by the Act makes an incompetency interview a much more attractive forum in which to discuss the question of loyalty. This Court, in *Beilan*, *Soler* and the present case, approves this practice even though it is contrary to the provisions of the Pechan Act and though it destroys the distinctions between "loyalty" and "incompetency."

Here, however, the majority even goes beyond the interpretation of incompetency given in *Soler*. In this case, we never reached the step where the teacher refused to answer questions posed by the administrative superior. Appellee was discharged without the superintendent having actually asked him questions at an interview. The record is clear that an initial hearing was held in October, 1952. At that time no questions were asked; and the superintendent gave appellee permission to refer the matter to counsel. Subsequently, August phoned the superintendent and informed him that under advice of counsel, he would act as had other teachers accused of disloyalty and would not answer questions concerning this subject. No questions were asked during the conversation. Dr. Hoyer, the superintendent, never fixed a time for a second interview at which he could propound the questions he wished to ask. Appellee was justified in expecting an interview before he was suspended. Without holding an interview at which he actually posed questions concerning loyalty, the superintendent had no way of knowing whether appellee would actually refuse to answer. Indeed, at the hearing before the School Board, the first opportunity he had to appear before an official body, August did answer questions concerning his association with Communist organizations.

In effect, the majority is holding that an administrative superior can discharge a teacher on the grounds of incompetency if the superior has reason to believe that the teacher *will* refuse to answer questions *in futuro*. This is a most

dangerous proposition. Although the present case concerns loyalty, the majority's position is equally as applicable in a situation concerning immoral or criminal activity. Consequently, a teacher accused of improper activity would be fired if he expresses reluctance to discuss the matter with his superior, even though the latter may never have questioned him formally concerning it.

Mere suspicion of refusal is not sufficient; there must be *an actual refusal to answer* to constitute incompetency, even within the wide interpretation given to that word by this Court. Human beings change their minds. A teacher must be given the opportunity at a scheduled interview to refuse to answer and must be on notice that his refusal will constitute incompetency. Any other position does violence to the Due Process clauses of both the United States and Pennsylvania Constitutions.

It is not difficult to lodge an emotional diatribe, as the majority does, against the Communist organization and its acknowledged conspiracy to conquer the world. When, however, we approve procedures which violate fundamental due process, notwithstanding the fact that the Legislature has provided an effective, direct and constitutionally sound alternative method for ridding ourselves of these undesirables, we lose all sense of law and order, and, indeed, play into the hands of the Communist conspiracy. The majority opinion encourages such action.

The majority asks, "What would happen to all organized society if government employees could close their eyes to directives which control the intermeshing of the vast complicated gears of governmental machinery?" There is an obvious answer to this question: If the procedures provided by the Peehan Act are utilized, such employees would be eliminated from the scene. There is, however, a second result, much more destructive to all organized society, which the majority does not consider: When, as happened here, government *officers* can close their eyes to statutory directives, the very fibre of our democratic government is weakened.

CONCURRING OPINION OF JONES, J., OF THE SUPREME COURT OF PENNSYLVANIA.

FILED: January 17, 1962.

JONES, *J.*

I concur simply in the result reached by the majority of the Court; a result, in my opinion, required by *Board of Public Education v. Beilan*, 386 Pa. 82, 125 A. 2d 327, affirmed 357 U. S. 399, 2 L. Ed. 1414.

ORDER OF THE SUPREME COURT OF PENNSYLVANIA RE PETITION FOR LEAVE TO FILE A PETITION FOR REARGUMENT AND PETITION FOR REARGUMENT.

Feb. 28, 1962. Petitions Denied. Per Curiam.

COURT OF COMMON PLEAS NO. 6

DECEMBER TERM, 1954.

No. 8270.

BOARD OF PUBLIC EDUCATION, School District of Philadelphia

v.

BERNARD AUGUST, a Professional Employee of the School District of Philadelphia,

Appellant.

APPELLANT'S EXCEPTIONS TO ADJUDICATION OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION.

AND NOW, this day of February, 1955, BERNARD AUGUST, by his attorney, WILLIAM J. WOOLSTON, excepts to the adjudication of the Superintendent of Public Instruction in the above entitled matter as follows:

1. The adjudication is erroneous in holding that the Act of December 22, 1951, P. L. 1726 (The Pennsylvania Loyalty Act) is not the exclusive method of inquiry into the loyalty of professional employees of a School District.

2. The adjudication is erroneous in holding that a refusal to answer questions as a witness before a committee of the House of Representatives of the United States at a time prior to the enactment of the Act of December 22, 1951, P. L. 1726, is either conclusive proof or some evidence of "incompetency" as that term is defined in § 1123 of the School Code (as amended by the Act of 1951, August 10, P. L. 1157, § 1).

3. The adjudication is erroneous in holding that said refusal mentioned in paragraph 2 above is either in itself

a violation of the school laws of the Commonwealth of Pennsylvania or some evidence of such violation.

4. The adjudication is erroneous in holding that there is any evidence in this record of incompetency on the part of the appellant.

5. The adjudication is erroneous in holding that a Superintendent of Schools has the power, simply by asking a question of a professional employee, to place upon said employee the burden of disproving a charge of incompetency at a subsequent hearing before the Board of Education.

6. The adjudication is erroneous in holding that an action of a professional employee, occuring in an academic year for which, after the action has been brought to the attention of the Superintendent of Schools, the professional employee was rated "satisfactory" on the rating cards approved by the School District of Philadelphia and the Department of Education of the Commonwealth by the said Superintendent, may, in a subsequent academic year, be used as a basis for dismissal of the said employee, either upon the ground of incompetency or that of wilful and persistent violation of the School Laws of the Commonwealth.

7. The adjudication is erroneous in disregarding the fact that there was no refusal to answer questions asked by the Board of Education at appellant's hearing.

8. The adjudication is erroneous in disregarding the statement of the Superintendent of Schools made at the hearing before the Board of Education that after Dr. Hoyer stated that he proposed to ask appellant questions, Dr. Hoyer did not thereafter make an appointment or other meeting and actually ask any questions which appellant refused to answer.

9. The adjudication is erroneous in holding that, without specific and clearly defined authority in the statutes of the Commonwealth or valid regulations issued pursuant

thereto, a professional employee of a School District may be dismissed for refusal to answer questions of the Superintendent of Schools relating to his associations or beliefs, past or present: Such holding violates the School Code of the Commonwealth and the Due Process provision of the Fourteenth Amendment to the Constitution of the United States, as well as Article 1, § 4 of the Constitution of the Commonwealth.

10. The adjudication is erroneous in that it overlooks the fact that appellant was subpoenaed before the House Un-American Activities Committee after he had been suspended by the Superintendent of Schools and that appellant's refusal to answer certain questions at the House hearing occurred during appellant's suspension subsequent to his being charged but while he was waiting for hearing before the Board of Education.

11. The adjudication is erroneous for there is no evidence offered before the School Board that appellant had been a member of or associated with any political party or association while that political party or association was not a legally duly constituted political party within the State of Pennsylvania.

12. The adjudication is erroneous in that it fails to take into consideration appellant's exception, taken during the course of the hearing before the School Board, to a refusal to permit appellant to offer evidence to establish that certain members of the School Board were partial, and in the absence of being permitted to produce such evidence of partiality to be assured that the hearing was conducted by an impartial Board.

13. The adjudication is erroneous in failing to take into consideration appellant's exception to being denied the issuance of subpoena for the attendance of witnesses of his selection before the School Board.

14. The adjudication is erroneous in that it fails to consider appellant's exception that he was suspended during the period from November 23, 1953 until his hearing on March 22, 1954 and during his entire period of suspension there had been no determination by the School Board that he should be discharged.

15. The adjudication is erroneous in that it fails to consider appellant's exception to the fact that even though the hearing before the School Board was on March 22, 1954, appellant did not receive notice of the School Board's determination to discharge appellant until April 12, 1954, which period of time is in excess of the statutory ten days during which the School Board may consider question of discharge after hearing.

16. The adjudication is erroneous in that it fails to note that the act upon which the discharge was based was the acceptance by appellant of the advice of counsel after appellant had been advised by Dr. Hoyer that appellant might seek the advice of counsel prior to answering any questions which Dr Hoyer proposed asking, and that in fact Dr. Hoyer never did ask questions until after appellant had been suspended, and that the first time the questions were asked was at the hearing of the School Board at which time appellant answered all questions.

17. The adjudication is erroneous in holding that a pleading of the Fifth Amendment is evidence of incompetency when that pleading of the Fifth Amendment occurs subsequent to suspension and charge and while awaiting a hearing before the School Board on the items contained in the charge.

Respectfully submitted,

WILLIAM J. WOOLSTON,
Attorney for Appellant.

FILED
MAY 15 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961.

No. 874.

BERNARD AUGUST,

Petitioner,

v.

BOARD OF PUBLIC EDUCATION,
SCHOOL DISTRICT OF PHILADELPHIA,

Respondent.

On Petition for Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BERNARD AUGUST,

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BOARD OF PUBLIC EDUCATION, SCHOOL DISTRICT OF PHILADELPHIA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The Opinions in the Supreme Court of Pennsylvania are appended to the Petition for Certiorari.

JURISDICTION.

Petitioner has invoked the jurisdiction of this Court under Title 28 U. S. C., Section 1257.

Respondent submits that no question under the Constitution of the United States is raised by the dismissal of a public school teacher on the statutory ground of "incompetency" under the teachers tenure laws of Pennsylvania after due notice of charges and hearing thereon, where the charge was based on the teacher's refusal to answer proper questions of his Superintendent.

The decision of the Pennsylvania Supreme Court was based on adequate non-federal grounds.

The petitioner did not raise in the Pennsylvania courts the constitutional questions urged in the Petition for Certiorari, and the Pennsylvania Courts did not decide the constitutional questions.

QUESTIONS PRESENTED.

1. Where the refusal of a teacher to answer pertinent questions of his Superintendent constitutes incompetency and ground for dismissal under state law, was it a denial of due process to dismiss the teacher on evidence that the Superintendent informed the teacher of the nature of the inquiry at a personal interview, and the teacher declined to answer until he consulted counsel and subsequently informed the Superintendent by telephone that he would not answer such questions?

2. Where there is evidence that the teacher knew of the importance of the Superintendent's inquiry and no evidence that the Superintendent explicitly warned the teacher that he might be dismissed if he failed to answer, was it a denial of due process to dismiss the teacher for refusal to answer?

3. Where the refusal of a teacher to answer pertinent questions of his Superintendent constitutes incompetency and ground for dismissal under state law, was it a denial of due process to dismiss a teacher who has so refused, when the teacher later answered similar questions of the Board of Public Education in the course of his testimony at the subsequent hearing on the charge of refusal to answer the Superintendent?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The due process clause of the Fourteenth Amendment of the Constitution is set forth in the Petition for Certiorari.

Section 1257 of the Judicial Code of the United States, 28 U. S. C. § 1257, provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

STATEMENT.

This is a proceeding under the tenure provisions of the Public School Code of the Commonwealth of Pennsylvania, Act of March 10, 1949, P. L. 30, § 1122 et seq., as amended, 24 Purdon's Pa. Stat. Ann. §§ 11-1122 et seq., dismissing a public school teacher.

The Board of Public Education of the School District of Philadelphia dismissed the petitioner, after a hearing and due notice of charges, on the ground of incompetency. The charge was based on the refusal of petitioner to answer questions concerning alleged Communist affiliations in a professional interview with the Superintendent of Schools of the School District of Philadelphia.

At the written request of the Superintendent of Schools, petitioner reported to the Superintendent's office for a professional conference on October 14, 1952. At this conference, the Superintendent stated to the petitioner that he had information in his possession about which he would like to ask petitioner some questions, and that the material in his possession had an important bearing on petitioner's loyalty (R. 13a). Petitioner asked the Superintendent why should he admit anything when he did not know whether the Superintendent could corroborate or support the statements (R. 13a).

Although the Superintendent testified at the subsequent hearing before the Board of Public Education on the charges against petitioner that he did not ask petitioner any specific questions, the petitioner himself testified that the Superintendent told him that one of the questions was whether he was a member of the North Philadelphia branch of the Professional Section of the Communist Party (R. 50a).

The petitioner expressed a desire to consult counsel and the Superintendent gave him the opportunity to do so. On October 22, 1952, petitioner called the Superintendent on

the telephone and said that he had consulted counsel and that he would not answer the questions (R. 14a-15a).

The Board of Public Education conducted a formal hearing on the charges as required by Section 1127 of the Public School Code of 1949. The hearing was private at the request of the petitioner. At the hearing, the Superintendent testified concerning his interview with petitioner, petitioner's failure to answer questions at that time and petitioner's subsequent telephone call after he had consulted counsel.

The petitioner was represented by counsel at the hearing before the Board. He voluntarily testified over objection by counsel for the Board that he had been a member of the Communist Party up to 1950, that he had not been at all active in the Party after 1950 and that he had been advised by his attorney that he should not answer any questions asked by the Superintendent of Schools concerning his associations prior to the time of the enactment of the Pechan Act (Pennsylvania Loyalty Act of December 22, 1951, P. L. 1726, 65 Purdon's Pa. Stat. Ann. § 211).

The Board of Public Education sustained the charges against petitioner and ordered his dismissal. Petitioner appealed to the Superintendent of Public Instruction of the Commonwealth of Pennsylvania, as provided by the Public School Code, and the decision of the Board was affirmed. As further provided by the Public School Code, petitioner appealed to the Court of Common Pleas of Philadelphia County. On this appeal, petitioner did not request a hearing de novo as permitted on such an appeal by Section 1132 of the Public School Code, 24 Purdon's Pa. Stat. Ann. § 11-1132. He filed with his appeal his Exceptions to the adjudication of the Superintendent of Public Instruction which are appended to the Petition for Certiorari (pp. 41-44), and his appeal was heard on the record of his hearing before the Board of Public Education.

The Court of Common Pleas No. 6 of Philadelphia County sustained his appeal and set aside the dismissal on

the ground that he had not been asked a specific question (R. 137a, 147a).

The Board of Public Education appealed to the Supreme Court of Pennsylvania, which held that the dismissal of petitioner on the ground of incompetency under the Public School Code was warranted, reversed the order of the Court of Common Pleas and sustained the petitioner's dismissal.

After the decision of the Supreme Court, petitioner filed with the Supreme Court of Pennsylvania a Petition for Leave to File a Petition for Reargument and a Petition for Reargument, copies of which are appended to this Brief in Opposition (pp. 17-19). Both of these petitions were denied by the Supreme Court February 28, 1962, Per Curiam, without opinion (Pettition for Writ of Certiorari, p. 40).

ARGUMENT.

I. Petitioner Did Not Raise the Constitutional Questions in the State Court, and the State Court Did Not Decide the Constitutional Questions.

It is submitted that this Court is without jurisdiction under 28 U. S. C. § 1257, because the "title, right, privilege or immunity" now claimed by petitioner was not "specially set up or claimed under the Constitution of the United States" in the Pennsylvania courts.

It is apparent from the statement of Questions Presented and the Method of Raising Constitutional Questions, as set forth in the Petition for Certiorari (pp. 2, 6-7), that petitioner did not raise at any time in the state courts the constitutional questions which he now urges as meriting review by this Court. It is equally apparent from examination of the Opinion of the Supreme Court of Pennsylvania (Petition for Certiorari, pp. 11-34), that that Court did not consider and did not decide any questions under the Constitution of the United States.

The principal question raised in the Supreme Court of Pennsylvania was whether its decision in *Board of Public Education v. Beilan*, 386 Pa. 82, 125 A. 2d 327 (1956) [1] was still the law of Pennsylvania. The Pennsylvania Supreme Court had held in the *Beilan* case that the refusal of a public school teacher to answer questions of his Superintendent of Schools, in a professional interview regarding former Communist affiliations, constituted "incompetency" as a ground for dismissal under the tenure provisions of the Pennsylvania Public School Code (24 Purdon's Pa. Stat. Ann. § 11-1122). The Court had also decided in the *Beilan* case that a proceeding to dismiss the teacher for incompetency on the ground of his refusal to answer such

1. Affirmed by this Court in *Beilan v. Board of Public Education*, 357 U. S. 399 (1958).

questions of the Superintendent could properly be brought under the Public School Code, and that the Board was not precluded from so proceeding by the enactment of the Pennsylvania Loyalty Act of December 22, 1951, P. L. 1726, 65 Purdon's Pa. Stat. Ann. § 211. It was contended by the present petitioner in the Supreme Court of Pennsylvania that that Court had overruled its decision in the *Beilan* case by statements contained in its Opinion in *Board of Public Education v. Intille*, 401 Pa. 1, 163 A. 2d 420 (1960). The Court held, however, as it did in the case of *Board of Public Education v. Soler*, 406 Pa. 168, 176 A. 2d 632 (1962), that its decision in the *Beilan* case had not been overruled and that refusal by a teacher to answer his Superintendent constituted incompetency as a ground for dismissal under the Pennsylvania Public School Code.

Petitioner does not now challenge this conclusion grounded on an interpretation of the state law, nor does he seek to raise again the constitutionality of the conclusion, which was settled by the decision of this Court in *Beilan v. Board of Public Education*, 357 U. S. 399 (1958).

Petitioner did contend in the Supreme Court of Pennsylvania that his case should be distinguished from the *Beilan* case, on the ground that he had not been asked any question and that he had not refused to answer a question. He did not raise this issue, however, as a matter of any alleged deprivation of due process of the law or other violation of the Constitution. The contention was made as a matter of the sufficiency of the evidence. The Opinion of the Supreme Court so treated it in rejecting the contention. The Opinion pointed out (Petition for Certiorari, pp. 17-18):

> "... It is true that, taken apart from everything else in the record, one could read from replies made by Dr. Hoyer, in one circumscribed part of the record, that August was not questioned. However, when one reads the entire record it becomes as plain as a pikestaff that August was under interrogation at that first interview. ..."

The Court then quoted from the testimony of petitioner himself at his hearing before the Board, wherein he stated that Dr. Hoyer (the Superintendent of Schools) said to him that one of the questions he intended to ask was whether petitioner was a member of the North Philadelphia branch of the Professional Section of the Communist Party (R. 50a).

Thus, petitioner is in error in stating in his Petition that there was no evidence that he was asked a question which he refused to answer. Petitioner's Statement of the Case omits any reference to petitioner's testimony about his interview with Dr. Hoyer, in spite of the specific reference to it in the Opinion of the Supreme Court of Pennsylvania.

The Supreme Court of Pennsylvania also held that the statement made by petitioner to the Superintendent on the telephone, that he would not answer such questions, constituted a refusal to answer questions with the same effect as if the refusal had been manifested in a second professional interview, and that it would have been futile for the Superintendent to have arranged a second conference or interview with the petitioner after this refusal (Petition for Certiorari, pp. 18-19).

Thus, the Court held that the evidence was sufficient to show that the petitioner had in fact refused to answer questions of the Superintendent of Schools. At no time did petitioner contend in the Supreme Court of Pennsylvania or in any of the subordinate tribunals that such a determination would violate due process of law.

A second question which petitioner now urges as meriting review by this Court is that it was a denial of due process to dismiss him for refusal to answer, on the ground that he was given no warning that his refusal to answer might be ground for dismissal. Petitioner never raised this issue in the Pennsylvania courts. He not only failed to raise it as a matter of constitutional due process, but also failed to contend that the alleged lack of warning of

the consequences of refusal to answer would be any barrier to dismissal under either state law or federal law. The alleged lack of warning was not raised by petitioner as an issue in any way, as is plainly shown by the Method of Raising Constitutional Questions, set forth in the Petition for Certiorari (pp. 6-7).

The third question presented by petitioner as ground for review by this Court is that it was a denial of due process of law to dismiss him for refusal to answer the Superintendent of Schools when he had subsequently answered all relevant questions asked by the Board of Public Education in his hearing before the Board on the charge of having refused to answer the Superintendent.

Petitioner did contend in both the Court of Common Pleas and in the Supreme Court of Pennsylvania that his willingness to answer questions before the Board of Public Education and to tell that Board about his former Communist membership and affiliations atoned completely for his refusal to answer the Superintendent of Schools. This contention was rejected by the Supreme Court of Pennsylvania, although the Court of Common Pleas had apparently found some merit in the contention.

The argument of petitioner that he was entitled to this "locus penitentiae" was never advanced by petitioner or considered by the Courts as a matter of due process of law or other constitutional provision. It was treated by petitioner himself as a concept of the state law, as a defense to the charge of incompetency, and the Supreme Court of Pennsylvania held that the Pennsylvania law did not recognize this defense under the circumstances, that the petitioner's assumed "penitence" was a sham and a pretense, that it came too late, and that the petitioner's duty was to show candor and intellectual honesty toward his Superintendent and not merely to the Board of Public Education when he was before it on the charge of refusal to cooperate with the Superintendent. In so deciding, the Court did not touch any constitutional issue.

After the decision of the Supreme Court of Pennsylvania, petitioner filed with that Court a Petition for Leave to File a Petition for Reargument (Appendix, pp. 17-19). There were three grounds for seeking reargument, the first and third of which merely sought reconsideration of the questions of state law previously argued and expressly considered by the Court. The second ground for urging reargument attempted to raise, *for the first time*, a constitutional question, by the following statement:

> "As stated by the dissenting Opinion, there is involved a denial of due process as assured by both the Constitution of this Commonwealth and of the United States, *which denial is not considered by the Opinion of the Court and was not raised or considered by either appellant or appellee in either the briefs or oral arguments.*"

Thus, petitioner conceded in his Petition for Reargument that he had not previously raised and that the Court had not considered the constitutional questions which he now urges this Court to review.

The Supreme Court of Pennsylvania denied the Petition for Leave to File a Petition for Reargument and the Petition for Reargument without opinion.

It is settled by the decisions of this Court that the raising of a constitutional question for the first time on a Petition for Rehearing addressed to the state Court is not sufficient to give this Court jurisdiction under 28 U. S. C. § 1257, unless the state Supreme Court actually entertains the Petition for Rehearing or Reargument and considers and decides the constitutional question. In this case, the Pennsylvania Supreme Court denied the Petition for Reargument without opinion.

Radio Station WOW v. Johnson, 326 U. S. 120 (1945);

Herndon v. Georgia, 295 U. S. 441 (1935).

Petitioner is not in a position to complain that he had no opportunity to raise the constitutional questions in the Pennsylvania courts, which he now desires to raise by Petition for Certiorari. The fact that he was the appellee in the Supreme Court of Pennsylvania did not prevent him from raising these issues as alternate grounds for affirmance. Likewise, petitioner cannot claim that the decision of the Supreme Court of Pennsylvania was such a surprise to him that he had no adequate opportunity to raise the constitutional issues. It was surely foreseeable that the Pennsylvania Supreme Court would adhere to its previously expressed rule of *Board of Public Education v. Beilan*, 386 Pa. 82, 125 A. 2d 327 (1956) and decide the question of the state law against petitioner as it did. Petitioner was originally the appellant in the administrative appeal to the State Superintendent of Public Instruction from his dismissal by the Board of Public Education. He also appealed from the decision of the State Superintendent to the Court of Common Pleas.

Furthermore, petitioner did not raise these constitutional questions on his appeal from the Superintendent of Public Instruction to the Court of Common Pleas, although he filed Exceptions with the Court, which are printed in the Appendix to the Petition for Certiorari (pp. 41-44).

The decision of the Supreme Court of Pennsylvania rested on non-federal grounds which were completely adequate to support the result.

II. The Constitutional Questions Raised by Petitioner Are Insubstantial.

1. The Contention That There Was No Evidence That Petitioner Refused to Answer a Question Does Not Raise a Substantial Constitutional Question.

Petitioner argues that the evidence showed that he was not asked a question and that therefore there was no evidence that he refused to answer a question. In support of this contention, petitioner printed in his Petition for Cer-

tiorari (pp. 3-4) only an isolated extract from the record of his hearing, in which the Superintendent testified that he told petitioner he wanted to ask him questions relating to his loyalty and did not ask a specific question.

In disposing of the argument that petitioner had not refused to answer a question, the Opinion of the Supreme Court of Pennsylvania pointed out that the entire record clearly showed that petitioner was under interrogation at his interview, and quoted the testimony of petitioner himself that the Superintendent told him that one of the questions was whether petitioner was a member of the North Philadelphia branch of the Professional Section of the Communist Party of Philadelphia. (Petition for Certiorari, pp. 17-18).

Similarly, the Supreme Court of Pennsylvania rejected the contention of petitioner that he did not refuse to answer questions when he was given the opportunity to consult counsel and then communicated his refusal to answer to the Superintendent by a telephone call in place of having a second personal conference with the Superintendent.

The evidence was fully adequate to show that petitioner refused to answer questions as charged. In any event, the sufficiency of the evidence is not a constitutional question. The determination that the evidence was sufficient constitutes a finding of fact by the Court, and this Court will not review the finding of fact of a state Supreme Court.

> "There are no exceptional circumstances of any kind that would justify us in rejecting the Supreme Court's findings, they are not without factual foundation, and we accept them." *Lloyd A. Fry Roofing Co. v. Wood*, 344 U. S. 157, 160 (1952).

See also *Portland Railway, Light & Power Co. v. Railroad Commission of Oregon*, 229 U. S. 397, 412 (1913).

2. THE CONTENTION THAT PETITIONER WAS NOT WARNED THAT HIS REFUSAL TO ANSWER MIGHT BE GROUND FOR DISMISSAL DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION.

Petitioner was called for a personal interview with the Superintendent of Schools of the School District of Philadelphia. The Superintendent informed petitioner that he desired to ask him questions which had an important bearing on his loyalty. Petitioner requested and was accorded the right to consult counsel. Under these circumstances, there is no doubt that petitioner fully understood that the inquiry was important and that the Superintendent considered it important. Certainly no further explicit warning that refusal to answer such questions could lead to dismissal was necessary.

Petitioner was dismissed for incompetency under the Pennsylvania Public School Code. The incompetency consisted of lack of candor in refusing to answer important questions relating to his professional fitness asked by his superior, the Superintendent of Schools.

The Supreme Court of Pennsylvania did not deal explicitly with the contention that petitioner was not given warning of the consequences of dismissal for refusal to answer, as petitioner never raised this question, as a matter of either state law or federal law. The Court did state in its Opinion, however, that petitoner was not naive, and that he knew that the Superintendent did not intend to talk to him on the state of the weather but on the state of his attachment to Communist ideology (Petition for Certiorari, p. 19).

The Opinion also referred to petitioner's response to the Superintendent's statement that he desired to question petitioner regarding loyalty, to which petitioner said, "Why should I admit anything before I see whether you can corroborate it?", as showing petitioner's lack of candor and his deficiency in professional attitude, civic responsibility, appreciation and ideals (p. 20).

The Pennsylvania Supreme Court was fully warranted in concluding that petitioner thoroughly understood the importance of the inquiry and the necessity of responding to it, and that he was properly found to be incompetent because of his failure to answer. In all material respects, the case of petitioner is the same as that of *Board of Public Education v. Beilan*, 386 Pa. 82, 125 A. 2d 327 (1956), affirmed 357 U. S. 399 (1958), where refusal to answer the Superintendent under similar circumstances was held to be incompetency, and dismissal on this ground did not infringe any constitutional right of the teacher. The fact that there was no evidence that petitioner was explicitly warned of the consequences of his refusal is not a material distinction.

Accordingly, this question is not a substantial one for this Court, even if it had been raised by the petitioner in the state courts.

3. The Contention That Petitioner Should Not Be Dismissed for His Refusal to Answer the Superintendent, When He Subsequently Testified Before the Board of Public Education, Does Not Raise a Substantial Question.

Petitioner was charged with incompetency in refusing to answer questions of the Superintendent of Schools. At his hearing before the Board of Public Education on this charge, he offered to answer any questions of the Board of Public Education regarding his former Communist affiliations and was permitted to so testify, over objection of counsel for the Board. The testimony was not directly material to the charge of refusal to answer the Superintendent. Its only relevancy was to confirm that there was a highly important reason for the Superintendent's desire to question this teacher and to show that petitioner had important and relevant information which he could have given the Superintendent if he had not refused.

As the Opinion of the Supreme Court of Pennsylvania pointed out, petitioner was one of 8,000 teachers employed

in the Philadelphia school system and owed a duty to his administrative superior, the Superintendent. He did not compensate for his failure to perform this duty by his willingness, much later, to answer questions before the Board of Public Education at a hearing which was concerned with his refusal to answer the Superintendent and not with his Communist affiliations (Petition for Certiorari, pp. 31-33).

The Court also considered that petitioner was not sincerely penitent for his refusal to answer the Superintendent (pp. 32-33).

In so concluding, the Pennsylvania Supreme Court did not decide any federal constitutional question, and petitioner had never raised this contention as a constitutional issue.

It is manifest that if the refusal of an employee to answer questions of his administrative superior is ground for dismissal, as has been established in Pennsylvania, the question of whether it is a defense to that charge to be willing at a later time to answer similar questions of the governing Board is not a matter arising under the Federal Constitution and involves no question of due process of law. At most, it involved only a question of state law.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

EDWARD B. SOKEN,
Attorney for Respondent.

Appendix

IN THE
SUPREME COURT OF PENNSYLVANIA

No. 473, January Term, 1961.

BOARD OF PUBLIC EDUCATION
SCHOOL DISTRICT OF PHILADELPHIA

v.

BERNARD AUGUST,

Appellee.

PETITION FOR LEAVE TO FILE A PETITION FOR REARGUMENT.

And Now comes appellee and petitions this Court the privilege and right to file a petition for reargument, attached hereto, even though said petition is filed more than 10 days from entry of final judgment by this Court, and in support thereof appellee alleges:

1. Appellee's counsel's press of other legal matters prevented appellee's counsel from proper and due consideration of the wisdom of filing a petition for reargument and appellee's counsel just learned of the fact alleged in first assigned reason for reargument.

2. The issues involved in the requested petition for reargument are of substantial constitutional importance not only to appellee but to all public employees.

3. This Court's Rule 71 specifically allows the extension of time for the filing of petition for reargument upon cause shown.

Respectfully submitted,

WILLIAM J. WOOLSTON,
Attorney for Appellee.

IN THE
SUPREME COURT OF PENNSYLVANIA

No. 473, January Term, 1961.

BOARD OF PUBLIC EDUCATION
SCHOOL DISTRICT OF PHILADELPHIA

v.

BERNARD AUGUST,

Appellee.

PETITION FOR REARGUMENT.

To the Honorable Court:

And Now comes appellee and petitions this Court for reargument for the reasons overlooked or misapprehended by the Court, which are set forth below:

1. The Opinion of this Court is in error in holding that *Board of Public Education v. Intille, et al.*, 401 Pa. 1, did not directly overrule *Board of Public Education v. Beilan*, 386 Pa. 82, for appellees' brief in *Board of Public Education v. Intille, et al.*, in its statement of questions specifically raised the contention that the refusal to answer a question by a Congressional Committee implying subversive affiliations was an act of incompetency under the Public School Code and the Court's final paragraph specifically rejects that contention and specially states "anything in the Beilan case to the contrary is herewith overruled for the future".

2. As stated by the dissenting Opinion, there is involved a denial of due process as assured by both the Constitution of this Commonwealth and of the United States, which denial is not considered by either appellant or appellee in either the briefs or oral arguments.

3. This Court reverses what it held in *Beilan* and repeated verbatim in *Imble* as to application of locus penitentiae for a teacher such as Deacon, who "volunteered his unrestrained revelation of his buried aberration of the past" and "who has entirely discarded past subversive affiliations and has abided by a loyalty oath in good faith".

WHEREFORE it is prayed that this Court grant reargument for reconsideration of the above three legal questions, all of which are substantial legal principles which in the future will be applicable to others.

Respectfully submitted,

WILLIAM J. WOOLSTON,
Attorney for Appellee.